Bank Pertanian Malaysia Bhd v Amir Firdaus bin Nordin

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-03(IM)(NCC)-45–06 OF 2017

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TENGKU MAIMUN, NALLINI PATHMANATHAN AND ZABARIAH YUSOF JJCA

3 MAY 2018

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Bankruptcy — Notice — Setting aside — First bankruptcy notice ('BN') issued by judgment creditor ('JC') against judgment debtor ('JD') set aside because JD's name was wrongly stated in advertisement for substituted service — Whether JC's failure to appeal against decision did not bar it from filing a second BN against JD because no substantive issue in first BN argued and finally adjudicated upon by the court — Whether filing of second BN not barred by res judicata nor was it an abuse of process of court

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Bankruptcy — Notice — Setting aside — Summons in chambers ('SIC') to set aside bankruptcy notice ('BN') — Whether first date endorsed on SIC for parties to appear in court was NOT hearing date of SIC — Whether that date was only for case management to, inter alia, fix hearing date — Whether rules relating to case management in Rules of Court 2012 applied to formal applications made in bankruptcy proceedings even though Bankruptcy Rules 1969 ('the BR') did not provide for case management — Whether judgment debtor could not argue judgment creditor's affidavit in reply filed less than three clear days before date endorsed on SIC breached r 22 of the BR — Whether r 276 of the BR allowed Rules of Court 2012 relating to case management to be extended to bankruptcy proceedings

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The appellant ('the bank') filed a bankruptcy notice ('BN') against Amir ('the respondent') on his failure to settle a monetary judgment. That BN ('the first BN') was set aside by the Court of Appeal. The bank did not appeal against the decision but proceeded to issue a second BN against the respondent. The respondent applied by summons in chambers ('SIC') to set aside the second BN, inter alia, on the ground the second BN was caught by the doctrine of res judicata. The date given on the SIC for the parties to appear in court was 22 December 2006. Until that date, the bank did not file any affidavit in reply to the SIC. However, when parties appeared in court on that date, the senior assistant registrar ('SAR') directed the bank to file its affidavit in reply on or before 29 December 2016. The bank filed its reply affidavit on 27 December 2016. On 26 January 2017, the SAR dismissed the respondent's SIC. The judge in chambers allowed the respondent's appeals against the decisions of the SAR to allow the bank's affidavit in reply and to set aside the SIC. With regard

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to the decision to allow the bank's reply affidavit, the judge agreed with the respondent's contention that it breached r 22 of the Bankruptcy Rules 1969 ('r 22') in that the bank should have filed and served its affidavit in reply not less than three clear days before the date given on the SIC, namely, 22 December 2006. The judge held that since the bank did not apply for any extension of the time prescribed under r 22, the SAR should not have allowed the bank's reply affidavit as no reason for the delay in its filing was given. The judge also held that the bank was estopped from filing the second BN on the ground of res judicata since it did not appeal against the decision to set aside the first BN. At the hearing of the instant appeal against the judge's decision, the bank argued that res judicata did not apply to bankruptcy proceedings and that the first date endorsed on the SIC on its extraction from court was not the hearing date of the SIC but only the date for case management. In reply, the respondent, citing O 1 r 2(2) of the Rules of Court 2012 ('the ROC'), contended that the ROC's rules concerning case management did not apply to bankruptcy proceedings because the latter were specifically governed by the Bankruptcy Act 1967 and the Bankruptcy Rules 1969. The respondent also submitted that even if the second BN was not barred by res judicata, it was an abuse of process of court.

Held, allowing the bank's appeal and setting aside the decision of the High Court:

(1) Although there was no provision in the Bankruptcy Rules 1969 on case management, nothing in the rules prevented the court from managing bankruptcy cases like all other cases. It was common knowledge that for a more efficient and speedy disposal of cases, it had been the court's practice to case manage all cases first before the actual hearing took place. In the event of lacunae, the Bankruptcy Rules allowed for the application of the ROC. Rule 276 of the Bankruptcy Rules stated that 'in the absence of any rule regulating any proceeding under the Act or these rules, the Rules of the High Court shall apply, mutatis mutandis' (see para 18).

(2) The first date endorsed on the SIC, ie, 22 December 2016, was not a hearing date. In accordance with established practice, that was a case management date. As such the filing of the bank's affidavit in reply on 27 December 2016 for the hearing of the SIC on 26 January 2017 was perfectly in order. There was no breach of r 22 of the Bankruptcy Rules. Any purported granting of extension of time by the SAR to the bank to file the affidavit in reply did not arise (see para 19).

(3) The doctrine of res judicata did not apply in the instant case. For the doctrine to operate, it was trite that there had to be adjudication by the court of matters or issues raised in the earlier proceedings. Absolutely no facts were adverted to by the respondent as to what exactly were the matters that were ventilated and adjudicated upon in the first BN such that the second BN was caught by res judicata. Apart from the bare

averment of res judicata, the respondent did not apprise the court as to what were the issues that were finally determined in the first BN. It was apparent from the bank's submission that in the first BN, the respondent's name was wrongly stated in the advertisement for substituted service. The setting aside of the first BN on that issue could not and did not amount to res judicata to estop the bank from filing the second BN when the judgment itself remained valid and unsatisfied; neither could the filing of the second BN be said to be an abuse of process of the court (see paras 20 & 23).

[Bahasa Malaysia summary

Perayu ('bank') memfailkan notis kebankrapan ('NK') terhadap Amir ('responden') ke atas kegagalannya untuk menyelesaikan penghakiman kewangan. Bahawa NK ('NK pertama') diketepikan oleh Mahkamah Rayuan. Bank tidak merayu terhadap keputusan tetapi meneruskan untuk mengeluarkan NK kedua terhadap responden. Responden memohon saman dalam kamar ('SDK') untuk mengetepikan NK kedua, antara lain, atas alasan doktrin res judicata boleh digunapakai ke atas NK kedua tersebut. Tarikh yang diberikan ke atas SDK untuk pihak-pihak hadir di mahkamah adalah 22 Disember 2006. Sehingga tarikh tersebut, bank tersebut tidak memfailkan apa-apa afidavit jawapan kepada SDK. Walau bagaimanapun, apabila pihak-pihak hadir di mahkamah pada tarikh tersebut, penolong kanan pendaftar ('PKP') mengarahkan bank tersebut untuk memfailkan afidavit jawapannya pada atau sebelum 29 Disember 2016. Bank tersebut memfailkan afidavit jawapannya pada 27 Disember 2016. Pada 26 Januari 2017, PKP menolak SDK responden. Hakim dalam kamar membenarkan rayuan-rayuan responden terhadap keputusan-keputusan PKP untuk membenarkan afidavit jawapan dan untuk mengenepikan SDK tersebut. Berkenaan keputusan untuk membenarkan afidavit jawapan bank, hakim bersetuju dengan hujahan responden bahawa ia melanggar k 22 Kaedah-Kaedah Kebankrapan 1969 ('k 22') di mana bank sepatutnya memfailkan dan menyerahkan afidavit jawapannya tidak kurang dari tiga hari sebelum tarikh diberikan ke atas SDK, iaitu, 22 Disember 2006. Hakim memutuskan bahawa memandangkan bank tersebut tidak memohon untuk pelanjutan masa yang ditetapkan di bawah k 22, PKP tidak patut membenarkan afidavit jawapan bank kerana tidak ada alasan diberikan untuk lewat dalam memfailkannya. Hakim juga memutuskan bahawa bank diestop daripada memfailkan NK kedua tersebut atas alasan res judicata memandangkan ia tidak merayu terhadap keputusan mengenepikan NK pertama tersebut. Pada pendengaran rayuan ini terhadap keputusan hakim, bank tersebut berhujah bahawa res judicata tidak diguna pakai kepada prosiding kebankrapan dan bahawa tarikh pertama yang diendorskan ke atas SDK atas pengekstrakannya daripada mahkamah bukan tarikh pendengaran SDK tersebut tetapi hanya tarikh untuk pengurusan kes. Dalam menjawab, responden, merujuk A 1 k 2(2) Kaedah-Kaedah Mahkamah 2012 ('KKM'), berhujah bahawa kaedah-kaedah KKM berkenaan pengurusan kes tidak

digunapakai kepada prosiding kebankrapan kerana prosiding kebankrapan dikawal secara spesifik oleh Akta Kebankrapan 1967 dan Kaedah-Kaedah Kebankrapan 1969. Responden juga berhujah bahawa walaupun jika NK kedua tidak dihalang res judicata, ia adalah penyalahgunaan proses mahkamah.

Diputuskan, membenarkan rayuan bank dan mengenepikan keputusan Mahkamah Tinggi:

(1) Walaupun tidak terdapat peruntukan di dalam Kaedah-Kaedah Kebankrapan 1969 ke atas pengurusan kes, tidak terdapat apa-apa di dalam kaedah-kaedah menghalang mahkamah daripada menguruskan kes-kes bankrap seperti kes-kes lain. Ia adalah pengetahuan umum bahawa untuk pendengaran kes yang lebih cekap dan cepat, ia adalah amalan mahkamah untuk menguruskan kesemua kes dahulu sebelum pendengaran betul kes tersebut. Sekiranya terdapat lakuna, Kaedah-Kaedah Kebankrapan membenarkan permohonan KKM. Kaedah 276 Kaedah-Kaedah Kebankrapan menyatakan bahawa 'in the absence of any rule regulating any proceeding under the Act or these rules, the Rules of the High Court shall apply, mutatis mutandis' (lihat perenggan 18).

(2) Tarikh pertama yang diendorskan ke atas SDK, adalah, 22 Disember 2016, bukan tarikh pendengaran. Mengikut amalan yang terbukti, ia adalah tarikh kes pengurusan kes. Dengan itu pemfailan afidavit jawapan bank pada 27 Disember 2016 untuk pendengaran SDK pada 26 Januari 2017 adalah betul-betul teratur. Tidak terdapat pelanggaran k 22 Kaedah-Kaedah Kebankrapan. Apa-apa pemberian lanjutan masa oleh PKP kepada bank tersebut untuk memfailkan afidavit jawapan tidak berbangkit (lihat perenggan 19).

(3) Doktrin res judicata tidak digunapakai dalam kes ini. Untuk doktrin diguna pakai, ia adalah nyata bahawa perlu terdapat penghakiman oleh mahkamah terhadp perkara-perkara atau isu-isu dibangkitkan di dalam prosiding terdahulu. Sama sekali tidak terdapat fakta dikemukakan oleh responden terhadap perkara-perkara apakah sebenarnya yang disuarakan dan dihakimi di dalam NK pertama tersebut sehingga res judicata boleh digunapakai terhadap NK kedua tersebut. Selain daripada penghujahan kosong res judicata, responden tidak memaklumkan mahkamah terhadap apa yang menjadi isu yang akhirnya ditentukan di dalam NK pertama tersebut. Ia adalah jelas daripada penghujahan bank bahawa di dalam NK pertama, nama responden salah dinyatakan di dalam iklan untuk penyampaian ganti. Pengenepian NK pertama atas isu tersebut tidak boleh dan tidak menjumlahkan kepada res judicata untuk estop bank tersebut daripada memfailkan NK kedua apabila penghakiman itu sendiri kekal sah dan tidak memuaskan; juga tidak boleh menyatakan

pemfailan NK kedua tersebut adalah penyalahgunaan proses mahkamah (lihat perenggan 20 & 23).]

Notes

For cases on setting aside notice of bankruptcy, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3661–3714.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)
Azman bin Jufri v Medtronic Australasia Pty Ltd [2015] 6 MLJ 841, CA (refd)
Chua Muk Kwee, Re: Ex-parte UMBC Finance Berhad [1994] 1 AMR 17, HC (refd)
Datuk Lim Kheng Khim v Malayan Banking Bhd [1993] 2 MLJ 298; [1993] 1 MLRA 185, SC (refd)
Huawei Tech Investment Co Ltd v Transition Systems (M) Sdn Bhd [2013] 5 MLJ 396, CA (refd)
Malayan Banking Bhd v Datuk Lim Kheng Khim [1992] 2 MLJ 540; [1992] 2 MLRH 149, HC (refd)
Matthias Chang Wen Chieh v American Express (M) Sdn Bhd [2012] 2 MLJU 214, CA (refd)
Khondker Yarad Ahmed, Re [2016] MLRHU 1, HC (refd)
Rohani @ Hamidah bt Nor v Sincere Leasing Sdn Bhd [1993] 1 AMR 225, HC (refd)
Vitoria, Re, ex p Vitoria [1894] 2 QB 387, CA (refd)

Legislation referred to

Bankruptcy Rules 1969 rr 22, 95, 276
Rules of Court 2012 O 1 r 2(2)

Appeal from: Bankruptcy No 29NCC-1357–09 of 2016 (High Court, Seremban)

V Ganesalingam (Asbeer Singh with him) (Rastam Singh & Co) for the appellant.
Amir Firdaus b Nordin (Roseli b Abd Ghani with him) (AG Roseli & Assoc) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal filed by the appellant/judgment creditor ('the judgment creditor') is against the decision of the learned judicial commissioner ('JC') of the High Court at Seremban in reversing the decision of the learned senior assistant registrar ('the SAR'). The decision of the learned SAR was to dismiss

A the respondent's ('judgment debtor') application to set aside the bankruptcy notice dated 6 September 2016 ('the second BN') and to allow the judgment creditor's application to file an affidavit in reply to oppose the said application.

B **[2]** We heard the appeal and had allowed the same. Below are our reasons.

THE BACKGROUND FACTS

C **[3]** On 13 January 2006, the judgment creditor obtained judgment against the judgment debtor under a loan facility granted by the judgment creditor to the borrower, Bunga Metro Sdn Bhd. The judgment debtor was a guarantor to the loan facility.

D **[4]** Pursuant to the judgment, the judgment creditor filed a bankruptcy proceedings against the judgment debtor vide Bankruptcy No 29–1092–07 of 2013 ('the first BN'). The first BN was set aside by this court on 6 August 2015. There was no appeal by the judgment creditor against the order of this court setting aside the first BN.

E PROCEEDINGS IN THE HIGH COURT

[5] On 6 September 2016, the judgment creditor issued the second BN which was served on the judgment debtor on 23 November 2016. On 29 November 2016, the judgment debtor filed an application under r 95 of the F Bankruptcy Rules 1969 ('the Bankruptcy Rules') to set aside the second BN on the grounds that the second BN is caught by the doctrine of res judicata; that the value of the three pieces of land charged to the judgment creditor as security for the loan exceeds the debt or is sufficient to set off the debt of the judgment debtor; and that the application is not prejudicial to the judgment creditor.

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[6] The judgment debtor's application to set aside the second BN came up before the learned SAR on 22 December 2006 where the learned SAR directed the judgment creditor to file affidavit in reply on or before 29 December 2016. Pursuant to the direction, the judgment creditor filed its affidavit in reply on H 27 December 2016.

[7] On 29 December 2016, the judgment debtor filed a notice of appeal ('encl 12') to the judge in chambers against the decision of the SAR allowing the judgment creditor to file affidavit in reply. The judgment debtor contended I that the decision of the SAR was in breach of r 22 of the Bankruptcy Rules which reads:

> Where any party intends to use affidavits in opposition to an application he shall deliver copies of them to every party affected thereby not less than three clear days before the day appointed for the hearing.

[8] On 26 January 2017, the learned SAR dismissed the judgment debtor's application to set aside the second BN. Aggrieved, the judgment debtor appealed to the judge in chambers ('encl 13').

[9] The learned JC heard the judgment debtor's appeals in encls 12 and 13 together where Her Ladyship allowed both the appeals. In respect of the appeal against the decision of the learned SAR allowing the judgment creditor to file the affidavit in reply, the learned JC held that r 22 of the Bankruptcy Rules must be strictly observed and since the judgment creditor did not file any application for extension of time to file affidavit in reply, there were no reasons given for the delay in filing the affidavit in reply. Without any reason, the SAR could not exercise her discretion arbitrarily. As for the appeal on the setting aside of the second BN, the learned JC agreed with the judgment debtor that as the first BN has been set aside, the judgment creditor is estopped from filing the second BN on ground of res judicata.

[10] Dissatisfied with the learned JC's decision, the judgment creditor appealed to this court.

THE APPEAL

[11] Before us, on the setting aside of the second BN, learned counsel for the judgment creditor submitted that the learned JC erred in her finding on res judicata as the doctrine of res judicata is not applicable to bankruptcy proceedings. In support of his submission, learned counsel cited *Malayan Banking Bhd v Datuk Lim Kheng Khim* [1992] 2 MLJ 540; [1992] 2 MLRH 149; *Datuk Lim Kheng Khim v Malayan Banking Bhd* [1993] 2 MLJ 298; [1993] 1 MLRA 185; *Re Khondker Yarad Ahmed* [2016] MLRHU 1; and *Vitoria, Re, ex p Vitoria* [1894] 2 QB 387.

[12] In respect of the affidavit in reply, learned counsel submitted that the judgment debtor's appeal against the decision of the learned SAR was premised on the assumption that the date stated in the summons in chambers ('the SIC') is a hearing date. That was not however the case as with the introduction of the case management system, the date endorsed in the SIC is not a hearing date but a case management date.

[13] In response, on the issue of affidavit in reply, learned counsel for the judgment debtor submitted that the judgment's debtor application to set aside the second BN was fixed for hearing on 22 December 2016 and until that date, the judgment creditor did not file any affidavit in reply. According to learned counsel, since there was no affidavit in reply, the judgment debtor sought for an

order that the second BN be set aside. The learned SAR however decided to extend time to allow the judgment creditor to file affidavit in reply on or before 29 December 2016.

[14] It was further submitted for the judgment debtor that case management provided for under the Rules of Court 2012 ('the ROC 2012') is not applicable to bankruptcy proceedings. Hence, under r 22 of the Bankruptcy Rules, the judgment creditor must file its affidavit in reply three days before the hearing date of 22 December 2016. The learned SAR, according to the judgment debtor, had no discretion to extend time. The judgment debtor relied on, inter alia, *Matthias Chang Wen Chieh v American Express (M) Sdn Bhd* [2012] 2 MLJU 214; *Azman bin Jufri v Medtronic Australasia Pty Ltd* [2015] 6 MLJ 841; *Rohani @ Hamidah bt Nor v Sincere Leasing Sdn Bhd* [1993] 1 AMR 225; and *Chua Muk Kwee, Re: Ex-parte UMBC Finance Berhad* [1994] 1 AMR 17.

[15] On setting aside of the second BN, learned counsel for the judgment debtor reiterated his position in the High Court that the second BN was barred by res judicata. The following cases were cited in support of his argument: *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 and *Huawei Tech Investment Co Ltd v Transition Systems (M) Sdn Bhd* [2013] 5 MLJ 396. It was further submitted, in the alternative, that even if res judicata is not applicable, the filing of the second BN was an abuse of process of court.

OUR FINDINGS

[16] As regards the affidavit in reply, the learned JC found that the application of the judgment debtor to set aside the second BN was fixed for hearing on 22 December 2016 and since the judgment creditor failed to file its affidavit in reply in accordance with r 22, the judgment debtor's appeal in encl 12 ought to be allowed.

[17] As set out above, under r 22 of the Bankruptcy Rules, the judgment creditor has to file the affidavit in reply three days before the hearing of the judgment debtor's application to set aside the second BN. Thus, the question which arises: when was the hearing of the application to set aside the second BN? The judgment debtor contended that it was on 22 December 2016 as the ROC 2012 under which case managements are conducted, is not applicable to bankruptcy matters. Learned counsel for the judgment debtor cited O 1 r 2(2) of the ROC 2012 which reads:

> These rules do not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.

[18] We accepted that there is no provision in the Bankruptcy Rules on case management. Nevertheless, we found nothing in the Bankruptcy Rules which prevents the court from managing the bankruptcy cases like all other cases. It is common knowledge that for a more efficient and speedy disposal of the cases, it has been the practice of the court to case manage all cases first, before the actual hearing takes place. We noted that in the event of lacunae, the Bankruptcy Rules in fact allows for the application of the Rules of Court 2012. Rule 276 of the Bankruptcy Rules states:

> In the absence of any rule regulating any proceeding under the Act or these rules, the Rules of the High Court shall apply, *mutatis mutandis*.

[19] We were therefore unable to agree with the judgment debtor that the first date endorsed on the judgment debtor's SIC ie 22 December 2016 was a hearing date. In accordance with established practice, that was a case management date. In the circumstances, the filing of the affidavit in reply by the judgment creditor on 27 December 2016 for the hearing on 26 January 2017 of the judgment debtor's application to set aside the second BN was perfectly in order. It was not in breach of r 22 of the Bankruptcy Rules. The purported granting of extension of time by the SAR to the judgment creditor to file the affidavit in reply did not arise.

[20] On res judicata, we found that the doctrine is not applicable in the instant case. We were not convinced that the cases relied upon by the judgment creditor to support the argument that res judicata does not apply, were wrongly decided. In *Malayan Banking Bhd v Datuk Lim Kheng Khim,* Abdul Hamid Mohamed JC (later CJ), said:

> Learned counsel for the judgment debtor argued that the petitioning creditor was estopped from commencing the present bankruptcy proceeding against the judgment creditor (sic) because earlier on a receiving order and adjudication order had been made by the High Court but set aside by the Supreme Court. However, he conceded that the order of the High Court was set aside on the sole ground that the bankruptcy notice was defective since the amount of interests were not quantified.
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> He cited the following authorities: ...
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> Clearly these authorities are not on point as none of them is a bankruptcy case. I asked the learned counsel if he could show me an authority which supported his contention. He admitted he could not. I am of the view that the decision of the Supreme Court on the earlier order made by Dzaiddin J in the earlier proceeding, on the ground that it (the Supreme Court) did, does not operate as res judicata against the petitioning creditor from issuing a fresh bankruptcy notice. The matter is res judicata as regards the earlier notice, not a fresh notice — see in *Vitoria, Re, ex p Vitoria* [1894] 2 QB 387.

[21] The decision of the High Court in *Malayan Banking Bhd v Datuk Lim Kheng Khim,* was affirmed by the Supreme Court. Through Mohamed

Dzaiddin SCJ (as the former CJ then was), the Supreme Court in *Datuk Lim Kheng Khim v Malayan Banking Bhd,* stated that:

> After hearing the creditor's petition and the submissions of counsel on 27 January 1992, the learned judicial commissioner was satisfied that the appellant had not shown sufficient cause why the receiving and adjudication orders should not be made. Accordingly, he made the orders in terms.
>
> Before us, En Ooi Teik Hoe, counsel for the appellant, raised several grounds of appeal, contending that the learned judicial commissioner was wrong in law on his decision. In dismissing the appeal, we hasten to state that we have no reason to disagree with the decision of the learned judicial commissioner. However, we would like to elaborate on the effect of the two affidavits (encls 3 and 15) vis a vis the bankruptcy petition.

[22] From the above decision of the Supreme Court, clearly it has upheld the findings of the High Court in *Malayan Banking Bhd* on all issues, including the issue of res judicata.

[23] In any event, for the doctrine of res judicata to operate, it is trite that there must be adjudication by the court of the matters or issues raised in the earlier proceedings. There were absolutely no facts adverted to by the judgment debtor as to what exactly were the matters ventilated and adjudicated in the first BN such that the second BN is caught by the doctrine of res judicata. In other words, apart from the bare averment on res judicata, the judgment debtor did not apprise us as to what were the issues that had been finally determined in the first BN. However, it was apparent from the submission for the judgment creditor (which the judgment debtor did not deny) that in the first BN, the name of the judgment debtor was wrongly stated in the advertisement for substituted service. The setting aside of the first BN on that issue cannot and does not amount to res judicata to estop the judgment creditor from filing the second BN when the judgment itself remains valid and unsatisfied. Neither can the filing of the second BN, upon setting aside of the first BN due to the mistake in the judgment debtor's name, be said to be an abuse of process of the court.

[24] For the above reasons, we found that the learned JC was plainly wrong in allowing the judgment debtor's appeals. We therefore unanimously allowed the judgment creditor's appeal with costs. The order of the High Court was set aside.

Appeal allowed and High Court's decision set aside.

Reported by Ashok Kumar